FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 9 1907
JAMES H. McKENNEY,
CLERK.

No. 212.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

**WILLIAM W. BIERCE, Limited,** a corporation, *Appellant,*
*vs.*
**CLINTON J. HUTCHINS, trustee,** *Appellee.*

Appeal from Supreme Court, Territory of Hawaii.

## Brief and Argument on behalf of William W. Bierce, Limited, Appellant.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY,
ATTORNEYS FOR APPELLANT.

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1905.

**No. 212.**

| | |
|---|---|
| **WILLIAM W. BIERCE, Limited, a corporation,** *Appellant.* **vs. CLINTON J. HUTCHINS, trustee,** *Appellee.* | **Appeal from Supreme Court, Territory of Hawaii.** |

**Brief and Argument on behalf of William W. Bierce, Limited, Appellant.**

---

This is an appeal granted by this court from the Supreme Court of the Territory of Hawaii.

In the trial court the facts were found as follows (Rec., 266-269):

"1.

That William W. Bierce, Limited, plaintiff, and the Kona Sugar Company, Limited, on February 21st, 1900, entered into the contract of that date attached to the deposition of Columbus Bierce, read in evidence.

2.

That the personal property sued for in this action was duly shipped to Honolulu, bills of lading having been taken out in the name of the plaintiff, but said property did not pass into the possession of the Kona Sugar Company, Limited, until after the contract of March 13th, 1901, was entered into.

3.

That on March 13th, 1901, plaintiff, and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit A.

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note for $37,044.53, secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st, 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of $37,044.53 given in settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof.

7.

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted.

8.

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor.

9.

That in view of all the circumstances of the case said contract of March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor.

10.

That some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable.

11.

That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action.

12.

That plaintiff did not intend to, nor did it in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its receiver.

13.

That the acts of the plaintiff prior to the beginning of this action did not amount to a rescission of the contract of March 13th, 1901, and said contract as a matter of fact has not been rescinded.

14.

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge, both record and actual, of the plaintiff's claim and title thereto.

15.

That the actual value of said articles sued for was, at the time of bringing this action, and now is the sum of $22,000.

16.

That plaintiff has suffered damages from defendant's detention of the property in the sum of $1,045.00, being interest at six per cent. on said sum of $22,000 from June 1st, 1903, to the date of judgment herein.

17.

That each and every material allegation in plaintiff's complaint has been established by the evidence.

The foregoing findings of fact is hereby allowed this 19th day of March, 1904.

(Signed) J. T. DeBolt,
*First Judge.*"

And conclusions of law as follows (Rec., 270-271):

"1.

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence.

2.

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th, 1901.

3.

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or ab-

solute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for.

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note therein for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st, 1900, and neither said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was the payment of the note of $37,-044.53, which had been given as one of the considerations for the settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and non-lienable items.

7.

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action.

8.

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for $22,000, its value, and also damages for its detention.

The foregoing conclusions of law is hereby allowed this 19th day of March, 1904.

(Signed) J. T. DeBolt,
*First Judge.*"

The contract of February 21, 1900, referred to in the finding of facts, is set forth in the record (Rec., 145-150). As the property was not delivered under this contract, the purchasers not being prepared to make payment, it is not deemed necessary or proper by us to print such contract as a part of this statement of facts. The goods purchased were shipped to Honolulu, bills of lading being taken in the names of the shippers as stated in finding 2, *supra,* and upon the purchasers failing to make payment the goods remained in a warehouse pending the execution of the conditional sale contract mentioned in the third finding of fact.

This contract was as follows (Rec., 153):

"Honolulu, H. I., March 13, 1901.

*Kona Sugar Company, Limited,*
*Honolulu, H. I.*

Gentlemen:

In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the

Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, payment of the money, and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bill of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,
(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13th, 1901.

THE KONA SUGAR CO., LTD.,
By its President, J. M. McCHESNEY.
By its Treasurer, F. W. McCHESNEY."

As found by the court and shown by the record (Rec., 137) the property was delivered to the Kona

Sugar Company immediately after the execution of the agreement of March 13, 1901.

The matters referred to in the findings 11-13, inclusive, are as follows: The Kona Sugar Company became financially embarrassed and passed into the hands of a receiver in the early part of 1902 (Rec., 212). The appellant's claim was placed in the hands of Kinney, McClanahan & Cooper, attorneys at Honolulu, by Mr. Gilbert, agent of appellant. This firm had claims of a great many other creditors (Rec., 95). Mr. McClanahan testified (Rec., 95-97):

> "As a result of a great many conferences between the officers of the Kona Sugar Co. and bondholders, stockholders and creditors, a committee was appointed, called a bondholders' committee, for the purpose of superintending the affairs of the corporation, which were then in the hands of a receiver, with the idea of and with the purpose of taking off the crop of sugar that was then maturing and realizing the sale of the sugar as an asset in order to pay the creditors of the corporation and clear its debts. This committee agreement was submitted to the court and received its approval, and under it for some time the receiver worked. The committee consisted of Cecil Brown, S. M. Damon and Mr. Humburg of Hackfield & Co. Prior to the making of this committee agreement on the 12th of May, we filed a notice of lien in this suit —in this matter. This lien was discontinued on the first of August, 1902. No suit was brought on this lien on the first of August, 1902, and on the 23rd of January, 1903, the suit was discontinued.
>
> "All of the acts which we did for Bierce & Co. at this time prior to the discontinuance of the suit looked towards the possible chance or possibility of saving the corporation's property. Everything was done to prevent an entire

liquidation and surrender, the loss of all these assets. When this purpose was finally abandoned it was because it was found to be impossible to save any of the assets of the corporation to pay anybody. We found that the receivers were running behind even in their receiver charges and couldn't pay the charges of the receiver itself; the receiver's certificates could not be paid. When this state of affairs came about and it was found then to be absolutely abortive and useless to attempt to do anything for the rehabilitation of the plantation, we then abandoned our mechanic's lien suit, dismissed it and had recourse to our replevin suit.

"We didn't take this action in the first instance because we knew that to take those rails back, off the property of the Kona Sugar Co., would mean a collapse of the company at once, with loss of thousands to the creditors, because the railroad was absolutely essential to taking off a certain portion of the crop of the Kona Sugar Co., and the only reason for filing this lien which we thought we had a right to file at the time, without looking it up very carefully, the only reason for filing it was simply to fortify our position as a possible creditor or claimant of the estate.

"The COURT: At the time the lien was filed did Bierce & Co. claim the title to the property now in question?

"A. I will say this in answer to that, That Bierce & Co. have never done anything but claim the title to the property under the conditional contract.

"The COURT: Upon what theory did they expect to have a lien on the property as their own?

"A. When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lien holders were preferred over certain other holders. We gave no thought whatever,

at the time of filing the lien, to whether it was a valid lien or whether it was an invalid lien. We have since learned that it was absolutely a nullity and of no value whatever to Bierce & Co., the filing of this suit. This is Bierce & Co.'s position from the start, so that they as bondholders occupied a more secure position in order to get their money than as lienholders or common creditors, and it was the desire of Bierce to get their money in some way. They didn't want the property at the time, they wanted the money; they wanted the contract carried out; they wanted the note of the Kona Sugar Co. paid, and we simply filed this lien at the time as an additional lever on the—hold on the material so furnished. That is all."

On cross-examination the witness stated that the lien was filed May 12, 1902. Suit was brought thereon August 1, 1902, which was discontinued January 25, 1903 (Rec., 98).

The complaint asserting this lien, and filed August 1, 1902, is found at p. 246 *et seq.* of the record, and the notice at p. 251 *et seq.* No action of any kind was ever taken by the court upon this claim of lien. It was dismissed without trial of any kind.

In November the appellant filed its motion and petition of intervention to have the sale ordered by the court made subject to its lien (Rec., 255-265).

In February, 1903, the appellant, having dismissed its claim to a lien, moved the court for leave to join the receiver as a party defendant in a proposed action of replevin, which motion was denied (Rec., 208-209).

Thereafter it attended the sale of the assets made under order of court, and gave public notice to all

bidders that it claimed the title to said property (Rec., 179-180). C. J. Hutchins, trustee, attempted to purchase and did, in fact, take possession of the property, with knowledge both record and actual, of appellant's claim and title thereto (Rec., 269; Finding 14). The record fails to disclose for whom Hutchins acted, but the presumption is strong that it was for the other creditors. If he had represented strangers to the record, *bona fide* purchasers, that fact would have been brought out in the evidence in the court below.

Demand for the return of the property was made upon Hutchins (Rec., 180), and this being refused, an action of replevin was brought against him (Rec., 37-47), and a seizure made upon the property (Rec.. 47). The defendant superseded the seizure by giving a return bond (Rec., 48).

It was in this replevin action that the finding of facts and conclusions of law heretofore set out in this statement were made.

From this action of the lower court, a writ of error was prosecuted to the Supreme Court of the territory, which reversed the conclusions of the lower court upon the question of election of remedies. The opinion of the court is in the record (Rec., 293).

The opinion shows that the facts found by the lower court are in nowise doubted or disturbed.

The court says (Rec., 299):

> "It has been settled in this jurisdiction that the findings of fact of a trial court, jury waived, have the same force as the verdict of a jury, but upon the question of election in this case the

material facts are undisputed and the construction of the contracts, which are in writing, is a matter of law for the court. Under such circumstances this court may reverse the findings and judgment of the trial court, and it does so in this case.

The exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper."

A petition and motion for rehearing was filed in the Supreme Court in apt time (February 25, 1905, Rec., 299-302), and on April 13, 1905, the court filed in the office of the clerk thereof a written request for further argument by counsel upon the motion for a rehearing (Rec., 303-304), and set down the case for such reargument on April 18, 1905. On April 29, 1905, it reaffirmed its former opinion (Rec., 305-311). Hartwell, J., also filed a concurring opinion (Rec., 312-315). Judgment of reversal was entered May 2, 1905, carefully limiting the effect of such reversal to the legal conclusions derivable from the acts of the parties as to the question of election of remedies (Rec., 316). Upon the petitioner giving notice that it would have no further evidence to offer in the court below, the Supreme Court modified its judgment May 6, 1905, by adding directions that the Circuit Court enter judgment for the defendant with costs (Rec., 319-320).

The petitioner gave notice of an intention to appeal the cause to this court under the Act of March 3, 1905, and to that end suggested to the court that it make a statement of the facts of the case in the nature of a special verdict in order that this court

might pass upon the merits, and tendered a statement of facts as petitioner conceived them to be established in the record (Rec., 322-333). This motion was disposed of by the following order (Rec., 333):

> "The plaintiff's motion herein filed that this court make findings of fact in the above entitled cause is denied, inasmuch as said cause came up on a bill of exceptions and this court has no jurisdiction to make findings of fact in matters so presented."

## ERRORS ASSIGNED.

(Rec., 352-356.)

*First.* Said Supreme Court of the Territory of Hawaii erred in entering judgment in said cause reversing the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant for the return of the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of twenty-two thousand dollars ($22,000), and interest thereon, and sustaining the exceptions of said appellee in so far as they raised the question of election.

*Second.* Said Supreme Court of the Territory of Hawaii erred in not affirming in all things the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant and against said appellee for the return of the property in controversy in said cause into the possession of said appellant and for the sum of one thousand forty-five dollars ($1,045) damages for the detention of said property, together with costs of suit taxed at the sum of fifty dollars and fifty cents ($50.50), or in the alternative, in case said property should not be so returned, for the value thereof, found and adjudged to be the sum of twenty-two thousand dollars ($22,000), and for the sum of one thousand and

forty-five dollars ($1,045) damages for the detention thereof, together with the costs of suit taxed at the sum of fifty dollars and fifty cents ($50.50).

*Third.* Said Supreme Court of the Territory of Hawaii erred in sustaining the exceptions of said appellee, and each of them in said cause, in so far as such exceptions raised the question of an election by said appellant between inconsistent remedies or between inconsistent remedial rights.

*Fourth.* Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-second exception of said appellee to the finding of the Circuit Court in said cause, which said twenty-second exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following finding:

"That the contract of March 13, 1901, was an entire contract and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof; to which finding the defendant objected as follows:

"Defendant objects to the sixth proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13, 1901, was not an entire contract nor intended so to be, but was a contract supplementary to the contract of February 21, 1900.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

*Fifth.* Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-seventh exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-seventh exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

"Defendant objects to the eleventh proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

*Sixth.* Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-eighth exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-eighth exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a material-man's lien against the Kona Sugar Company, Limited, and its receiver; to which finding the defendant objected as follows:

"Defendant objects to the twelfth proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

*Seventh.* Said Supreme Court of the Territory of Hawaii erred in sustaining the fortieth exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said fortieth exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the contract of March 13, 1901, was an entire contract for a lump sum consideration and contained lienable and nonlienable items; to which conclusion the defendant objected as follows:

"Defendant objects to the sixth proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling of the

court is here and now assigned as error by said defendant."

*Eighth.* Said Supreme Court of the Territory of Hawaii erred in sustaining the forty-first exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said forty-first exception is in the words and figures as follows, to wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

"Defendant objects to the seventh proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection, to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

*Ninth.* Said Supreme Court of the Territory of Hawaii erred in ruling that said appellant was estopped from maintaining said action of replevin for the property in controversy in said cause, for the reason that said appellant had previously elected to pursue a remedy inconsistent therewith, namely, by bringing the action for the price of said property and to enforce a materialman's lien for the same.

*Tenth.* Said Supreme Court of the Territory of

Hawaii erred in ruling that by bringing the action to enforce a materialman's lien for the price of the property in controversy in said cause, said appellant made a binding election to waive performance of the condition precedent reserved to it in the contract of March 13, 1901, between said appellant and the Kona Sugar Company, Limited, in pursuance of which said property was delivered to said sugar company, namely, payment in full of the promissory note in controversy in said cause, and to treat the title to said property as in said the Kona Sugar Company, Limited, or the receiver thereof, such as to preclude said appellant from maintaining said action of replevin for the possession of said property.

*Eleventh.* Said Supreme Court of the Territory of Hawaii erred in holding and construing said conditional sale contract of March 13, 1901, in controversy in said cause, to be a severable contract and not an entire contract such as to prevent a severance of the price of the lienable items from the price of the nonlienable items of the property or materials in controversy in said cause.

*Twelfth.* Said Supreme Court of the Territory of Hawaii erred in not holding that said appellant had no right to maintain the materialman's lien proceedings, and that its attempt to exercise such nonexistent right was a mistake of remedy made in ignorance of its legal rights, and as such did not amount to an election between inconsistent remedies or remedial rights, such as to preclude said appellant from maintaining said action of replevin for the property in controversy in said cause.

*Thirteenth.* Said Supreme Court of the Territory of Hawaii erred in not holding that the special findings of fact by said Circuit Court were sufficient to sustain the said judgment of said Circuit Court.

*Fourteenth.* Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the entering of said judgment by said Circuit Court in said cause which were sustained by the said Supreme Court.

*Fifteenth.* Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the rulings of said Circuit Court in said cause which were sustained by said Supreme Court.

*Sixteenth.* Said Supreme Court of the Territory of Hawaii erred in denying the petition of said appellant for a rehearing in said cause."

While not waiving the specific assignment of errors, it is our judgment that all of the exceptions can be discussed under the "third," "tenth," "eleventh" and "twelfth" of the above assignments.

## BRIEF.

### I.

The findings of fact by the trial court were adopted by the Supreme Court of the Territory, though different legal conclusions were held to follow from such facts. This is equivalent to a special finding by the Supreme Court.

*Stringfellow* v. *Cain,* 99 U. S., 610.

*Harrison* v. *Perea,* 168 U. S., 311, 323, and cases there cited.

### II.

Appeal and not writ of error was proper because of the provisions of the act of April 7, 1874 (18 Stat., 27).

*Story* v. *Black,* 119 U. S., 235.

*Idaho & O. Improvement Co.* v. *Bradbury,* 132 U. S., 509.

*Gregory Consolidated Min. Co.* v. *Starr,* 141 U. S., 222.

### III.

The doctrine of election, whether on the common law or equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention.

*Watson* v. *Watson,* 128 Mass., 152, 155.

*Standard Oil Co.* v. *Hawkins* (C. C. A., Seventh Circuit), 74 Fed., 395.

## IV.

No rights of third parties are involved. The property was in the custody of a court of equity. The attorney said to have made the election was acting for other creditors who, with a creditors' committee and the approval of the court, were carrying on the business of the insolvent debtor. Replevin would have made these plans impossible. The attorney swears he had no intention of making an election, and the facts show he could not have had, if exercising sound judgment. In such a case the party is not held to an election.

*Johnson-Brinkman Commission Co.* v. *Mo. Pac. Ry. Co.*, 126 Mo., 344 (s. c., 47 Am. St. Rep., 675).

*Wells* v. *Robinson*, 13 Calif., 134.

*In re* Van Norman, 41 Minn., 494, 496.

*Garrett* v. *Farwell Co.*, 199 Ill., 436, 440, 441.

## V.

In order that a person who is put to his election should be concluded by it two things are necessary:

*First.* A full knowledge of the nature of the inconsistent rights and of the necessity of electing between them.

*Second.* An intention to elect manifested, either expressly or by acts which imply choice and acquiesence.

*Spread* v. *Morgan*, 11 H. L. Cas., 588, 615.

## VI.

Even where there are inconsistent rights the question of the conclusive effect of an election depends upon whether the rights of third parties have intervened. If so, the election is conclusive. If not, it is not conclusive.

*Dickson* v. *Patterson,* 160 U. S., 584, 592.

*Campbell Printing Press Mfg. Co.* v. *Rockaway Publishing Co.,* 56 N. J. L., 676.

*Johnson-Brinkman Commission Co.* v. *Mo. Pac. Ry. Co.,* 126 Mo., 344 (s. c., 47 Am. St. Rep., 681, 682).

*Standard Oil Co.* v. *Hawkins,* 74 Fed., 395.

The cases cited in the opinion of the court below and relied upon involved the rights of third parties taking without notice.

*Lehman* v. *Van Winkle,* 92 Ala., 443.

*Van Winkle* v. *Crowell,* 146 U. S., 42.

## VII.

If the party does not in fact have two inconsistent rights, and merely attempts to assert a right he does not have, but supposes he has, and without obtaining any legal satisfaction therefrom, he is not precluded from asserting his actual right.

*Snow* v. *Alley,* 156 Mass., 193, 194, 195, and cases cited.

*Watson* v. *Watson,* 128 Mass., 152, 155.

*Fuller-Warren Co.* v. *Harter* (S. C. Wisc.), 53 L. R. A., 603, 606.

*In re* Norman, 41 Minn., 494, 496.

*Garrett* v. *Farwell,* 199 Ill., 436, 440, 441.

## VIII.

Two such rights did not exist in the case at bar.

(*a*) The claim for lien (Rec., 246, 250, 251) was based upon a contract never in force between the parties, and which had been settled by the contract of March 13, 1901. (Rec., 153.)

(*b*) In Hawaii only the materials actually entering into the construction can be allowed in the lien; others delivered under the same contract, but not used, cannot be so embraced.

Civil Laws Hawaii, Sec. 1741.

*Allen & Robinson* v. *Redward,* 10 Haw., 151.

(*c*) The court found (Rec., 268) "that some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable."

This is in accord with the decisions of other courts.

*Neilson* v. *Ia. Cent. Ry. Co.,* 51 Ia., 184.

*New England Car Spring Co.* v. *Balti. & O. Ry. Co.,* 11 Md., 81.

20 Eng. & A. Enc. of Law (2nd Ed.), 290.

23 *id.,* 721.

(*d*) The court likewise found (Rec., 267) "that the contract of March 13, 1901, was an entire contract, and intended so to be, for a lump consideration, which consideration was incapable of being apportioned so as to make possible the ascertain-

ment of the price of the lienable and nonlienable items thereof."

The earlier contract, which was settled and abrogated by the one of March 13, 1901, did not embrace the same quantity of material as the later one, and there was a difference in price of about $10,000. The rule therefore applies that where a contract is for a lump sum and contains lienable and nonlienable items, no lien can attach.

Phillips on Mechanic's Liens, Sec. 296.
*Adler* v. *World's Pastime Ex. Co.*, 126 Ill., 373.
*Morrison* v. *Minot*, 5 Allen, 403.
*Graves* v. *Bemis*, 8 Allen, 573.
*Mulvey* v. *Barron*, 11 Allen, 152.
*Driscoll* v. *Hill, id.*, 154.
*Allen* v. *Elwart*, 29 Ore., 428, 444.
*Gelty* v. *Ames*, 30 Ore., 573.
*Whiting* v. *Joslin*, 108 Mass., 103, 104.
*First National Bank* v. *Redman*, 57 Me., 405.

(*e*) It also appears that the Kona Sugar Company, Limited, did not own the land over which its right of way was supposed to extend, with the exception of two-thirds of a mile in a total of six miles laid with rails purchased of appellant. It had leases of some of the land not owned, and in one case only a verbal license. Under such circumstances the court below correctly found (Rec., 268) "that the acts of the plaintiff prior to the bringing of this action did not amount to a rescission of the contract of March 13, 1901, and said contract as a matter of fact has not been rescinded."

The facts therefore clearly bring the case within the authorities holding that where a person acts without a full knowledge, without intending to choose, in ignorance of material facts, and really without the right he supposes himself to possess, there is no election.

## ARGUMENT.

The question in this case is narrowed to the single issue whether the assertion of a mechanic's lien in the receivership proceedings not prosecuted to judgment, under the circumstances here disclosed, was such an election of remedies as prevented the appellant from asserting the rights conferred by the conditional sale contract, and bringing replevin for the property therein described on the ground that the title thereto had never passed to the Kona Sugar Company, Limited.

It is to be remembered that no rights of innocent purchasers are here involved. No one, so far as the record discloses, has been misled by the failure of the appellant to assert its real rights at an earlier date, or by its claim to a lien in the receivership proceedings. It clearly appears from Mr. McClanahan's testimony that it was the hope and expectation of the committee representing the creditors and of Mr. McClanahan and his firm, representing many of them, that if the company should be permitted to market its sugar crop of that year (1902) it would be enabled to discharge its indebtedness and go on; that it was necessary that the railroad and its equipment remain in place to enable this to be done. (Rec., 96.) All these hopes were shown by subsequent events to be without foundation. That they were honestly entertained by the parties on the ground there seems no reason to

doubt, as the arrangement of the committee received the approval of the court and of the officers of the debtor corporation. It is plain from Mr. McClanahan's testimony that in the course pursued he was acting quite as much or more for the other creditors represented by him, the committee of creditors and the court's plan, as for the appellant. In stating this we do not wish to be understood as imputing any wrong motive or improper conduct to Mr. McClanahan. We disclaim any such intention. We submit, however, that it is clearly apparent from his testimony that all parties in interest and the court entered upon a plan which would have been impossible if replevin had been brought and the property recovered under the contract, and that a client should not be bound by a technical election through the act of an attorney also representing other interests, taken with the purpose of carrying out a plan agreed upon by all parties in interest, including the debtor and the court, and without thought or intention of making an election between inconsistent remedies or the abandonment of any rights. And it seems to us that the fact that the attorney so alleged to have made an election was thousands of miles away from his client and not so situated as to permit conference with him directly is another reason why technical rules should not be applied.

At the outset, therefore, we wish to make it plain that we are not challenging the well known and generally accepted principle that a party having an election between two inconsistent remedies is bound by an election deliberately made and that suit

brought upon one precludes a subsequent resort to the other claim. It is our contention that the facts remove this case from the operation of the general rule stated and bring it within certain clearly defined exceptions thereto.

It is to be noted that the Kona Sugar Company, Limited, had issued bonds prior to the contract of March 13, 1901. Such issue is referred to in the contract, in which it is stipulated that:

> "Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, *upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.*"

Mr. McClanahan says:

> "When we filled this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims and lien holders were preferred over certain other holders. We gave no thought whatever at the time of filing the lien as to whether it was a valid lien or whether it was an invalid lien. We have since learned it was absolutely a nullity and of no value whatever to Bierce & Co., the filing of this suit."

Under this state of facts is it equitable that the appellant should lose the material sold, for which it has never been paid, to other creditors who have in nowise been misled or induced to extend credit on the faith of the ownership of this property by the debtor corporation, and to a purchaser taking,

as found by the court, with full knowledge of all the facts?

In *Watson* v. *Watson*, 128 Mass., 152, 155, the court, speaking by GRAY, C. J., said:

> "But the doctrine, whether applied in practice on the common law or on the equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. An election made in ignorance of material facts is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few. *Pusey* v. *Desbouvrie*, 3 P. Wms., 315; *Wake* v. *Wake*, 1 Ves. Jr., 335; s. c., 3 Bro. Ch., 255; *Padbury* v. *Clark*, 2 Macn. & Gord., 298; s. c., 2 Hall & Tw., 341; *Spread* v. *Morgan*, 11 H. L. Cas., 588, 602, 611, 615. See also *Stratford* v. *Powell*, 1 Ball & Beatty, 1; *Briscoe* v. *Briscoe*, 1 Jon. & Lat., 334; s. c., 7 Irish Eq., 123; *Sweetman* v. *Sweetman*, I. R., 2 Eq., 141. In *Reed* v. *Dickerman*, 12 Pick., 146, 151, and in *Delay* v. *Vinal*, 1 Met., 57, 65, the rule was so stated, and not denied, but the facts did not call for its application."

This language was used with reference to an election to take a beneficial interest under a will and its effect upon the right of the beneficiary so taking to set up a right of his own, even if otherwise legal and well founded, which would defeat or in any way prevent the full effect and operation of the will. The rule is equally applicable to an election in courts between inconsistent remedies.

Knowledge is not to be imputed as a matter of legal obligation, as the doctrine of election is not properly a rule of positive law, but a rule of practice in equity.

Thus *In re* Van Norman, 41 Minn., 494, 496, the court said:

> "But none of the cases supposed are at all analogous to the case at bar, which is simply one where a party has made a fruitless attempt to assert a right which he never possessed, and, being beaten, has made full restitution and compensation for the wrong which he committed. The rule is as undoubted as it is familiar that, where a party has inconsistent rights or remedies, he may claim or resort to one or the other, at his election, and that when once made his election is irrevocable. But we think it is equally true that a mere attempt to pursue a remedy or claim a right to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim; and this proposition, if sound, fully covers this case."

In *Garrett* v. *Farwell Co.*, 199 Ill., 436, 440, 441, the court said:

> "After that answer was filed no steps were taken in the case by appellant which in any way affected the rights of appellee and at the next term of court it was dismissed without prejudice. (*Flower* v. *Brumbach*, 131 Ill., 646; *Johnson-Brinkman Commission Co.* v. *Mo. Pac. Ry. Co.*, 126 Mo., 344; 47 Am. St. Rep., 675; *Equitable Co-operative Foundry Co.* v. *Hersee*, 33 Hun, 169.) In the latter case it was held that when the plaintiff had instituted a suit in affirmance of a contract, but had dismissed the same before judgment and before having derived any benefit therefrom, and which had inflicted no

injury upon the defendant, such action did not constitute an absolute election of inconsistent remedies, whereby plaintiff was afterwards precluded from prosecuting a new suit upon another and inconsistent remedy. In the Johnson-Brinkman Commission Company case it was held an attachment suit brought by a vendor of personal property against his vendee, if dismissed before final judgment, does not estop him from subsequently maintaining an action of replevin to recover the chattels, in the absence of any intervening rights, injury or change of position by reason of the attachment; and in the Flower case it was said (p. 651): 'The circumstances of a party having elected one of several remedies by action will not, in general, preclude him from abandoning such suit, and after having duly discontinued it he may adopt any other remedy.'

"The institution of a suit will not be held such a decisive act as to constitute a waiver of rights which would be inconsistent with the maintenance of such suit, (1) if the court in which the first action is brought has no jurisdiction to try the cause; (2) if the cause of action is prematurely brought and is defeated for that reason; (3) if the suitor has in his first action mistaken his remedy and is defeated on that ground; or (4) if an action is commenced in ignorance of material facts which proffer an alternative remedy, the knowledge of which is essential to an intelligent choice of procedure. 7 Ency. of Pl. & Pr., 365; *Enterprise Soap Works* v. *Sayers,* 51 Mo. App., 310; *New England Bank* v. *Lewis,* 8 Pick., 113; *Edgewood Distilling Co.* v. *Shannon,* 60 Ark., 133; *Bunch* v. *Grave,* 111 Ind., 351; *Smith* v. *Bricker,* 86 Iowa, 285; *Kingsbury* v. *Kettle,* 90 Mich., 476; *McLaughlin* v. *Austin,* 104 *id.,* 489; *In re* Van Norman, 41 Minn., 494; *Gould* v. *Blodgett,* 61 N. H., 115; *White* v. *Whiting,* 8 Daly, 23; *Bowdish* v. *Page,* 41 Hun, 170; *Wells* v. *Robinson,*

13 Cal., 133; *King* v. *Lagrange*, 50 *id.*, 328; *Mankin* v. *Mankin*, 91 Ia., 406; *McNutt* v. *Hilkins*, 80 Hun, 235."

In *Spread* v. *Morgan*, 11 H. L. Cas., 588, 615, Lord CHELMSFORD said:

> "In order that a person who is put to his election should be concluded by it two things are necessary. First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them. Second, an intention to elect manifested, either expressly or by acts which imply choice and acquiescence."

In *Johnson-Brinkman Commission Co.* v. *Mo. Pac. Ry. Co.*, 126 Mo., 344 (s. c., 47 Am. St. Rep., 675), a vendor of personal property brought an attachment suit against his vendee, which he dismissed before final judgment, and then brought replevin. It was claimed that he had elected between inconsistent remedies and therefore could not maintain the latter action. As here, there were no intervening rights, injury or change of position of the parties by reason of the attachment. The case contains a full discussion and cites the conflicting decisions. The court holds (47 Am. St. Rep., 681-682):

> "The authorities which hold that a person having two inconsistent remedies and electing to pursue one cannot thereafter pursue the other do so upon the ground of election, or, as most courts put it, estoppel. As was said in *Anchor Milling Co.* v. *Walsh*, 20 Mo. App., 106: 'There is no element of estoppel in the case. There is no estoppel by record, for the attachment suit has not proceeded to judgment. There is no *estoppel in pais*, for the defendant has not taken such action in consequence of the suing out of the attachment that he will re-

ceive detriment in a legal sense from the conduct of the plaintiff in changing his position and pursuing a different remedy.'

"There were no intervening rights in this case from the time of suing out the attachment until that suit was dismissed, nor is it claimed that the defendant therein was by reason thereof induced to change his position with respect of the wheat in controversy. 'Estoppel *in pais* may be defined to be a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Bigelow on Estoppel, 4th Ed., 445.

"The attachment suit was brought hastily and without time, as appears from the record, for the attorneys who brought it to investigate the facts in the case, who after having done so came to the conclusion that it was improvidently brought and dismissed it; and to hold, under such circumstances, that plaintiff is estopped by his election in that case from prosecuting this, in the absence of intervening rights, injury or change of position by anybody, by reason thereof, would be, we think, invoking a harsh and very unjust rule.

"But, aside from any misconception as to the institution of the attachment suit, as it was dismissed before judgment, before the rights of others had intervened, and as the defendant therein was in no way injured in consequence thereof, we are not inclined to hold that plaintiff is, by reason of the institution of that suit, estopped from prosecuting this."

Among other cases cited as holding a different doctrine is *Lehman* v. *Van Winkle,* 92 Ala., 443, cited by this court in *Van Winkle* v. *Crowell,* 146 U. S., 42, 50-51. This court, however, had before it in that case the rights of third parties. The purchasers there had received the property, put it

into use and mortgaged it to a third party before the vendor attempted to revest the title in himself through a conditional sale contract. Had there been no rights of third persons to consider, this court would not have reached the conclusion that the mere commencement of the attachment suit without consideration or intention to elect should, as between the vendor and vendee, nevertheless constitute an election. To so have held would have been to repudiate the great weight of authority that the question of election is one of equitable consideration.

This rule is also recognized in *Campbell Printing Press & Mfg. Co.* v. *Rockaway Publishing Co.*, 56 N. J. L., 676. In that case the trial court held that the institution of the action by the vendor for the purchase price was an election of his remedy and precluded him from bringing an action of replevin. This result was based upon the case of *Heller* v. *Elliott*, 44 N. J. L., 467, and *Leatherburg* v. *Connor*, 54 N. J. L., 172. The Appellate Court reviewed these two cases and showed that the rights of third persons had intervened in both instances, while in the Campbell case such was not the fact. The action of the lower court was therefore reversed.

An equivalent distinction was made in this court in *Dickson* v. *Patterson*, 160 U. S., 584, where the trial court dismissed a bill for an accounting and to set aside certain deeds as fraudulent on the ground that the complainant had elected to retain what he had received and to pursue his claim for moneys still due, and could not maintain a suit to set the whole transaction aside. This court reversed that action, holding that the complainant was not ac-

quainted with all the facts and was not (p. 592) "for that reason—no rights of innocent third parties having intervened—to be denied the fullest relief to which according to the principles of equity he is entitled."

In the case at bar no conveyance was made by the debtor company of the property in question. No creditor obtained judgment or a levy upon the property. The whole property was in a court of equity for administration. The day when any creditor could obtain any advantage in the race of diligence had passed. A court of equity is not the place to obtain property through forfeitures or by the mistakes either of law or fact of persons having interests in or claims against the property in course of administration. Such a court never seeks to add to the fund by the application of technical rules or snap judgments.

This is well illustrated in *Standard Oil Co.* v. *Hawkins,* 74 Fed., 395 (C. C. A., Seventh Circuit), where a national bank received funds after it was insolvent and known to be so by its officers. These funds came to the hands of a receiver appointed by the comptroller of the currency. The defrauded depositor filed his claim as unpreferred. This was allowed, a certificate of proof issued to him and the various appropriate entries made in the books of the receiver and of the departmental officers at Washington. Out of the assets of the bank collected by the receiver a dividend was declared and a check for its share tendered this depositor. It then consulted counsel and learned for the first time that it might have reclaimed its deposit as

fraudulently received. It declined the check, tendered back the certificate of proof and filed its bill to set aside its apparent election and to reclaim the amount of its deposit, etc. This right was sustained. The court said (p. 398):

> "Of course, the assertion by the appellant of a general claim against the bank was, in a sense, inconsistent with its assertion of right to pursue the proceeds of the drafts; and it cannot be allowed to shift its position, if the change would impose detriment, in a legal sense, upon the opposing party. It would then be estopped by its conduct. But if there be no estoppel, if no injury has resulted from the remedy pursued, to deny one the right to change position would be to say that a litigant must in the first instance, and at his peril, elect his remedy, and that he may thereafter pursue no other, although the law affords him a better one, which, through ignorance or misconception, he had failed to adopt, notwithstanding his opponent has suffered no detriment from the mistaken course pursued. We do not understand the law to justify so harsh a rule. If the appellant, in ignorance of its legal rights, believed no other course was available than to prove its debt as a general creditor; that it had no right, because of the fraud of the bank, to retake from the receiver the proceeds of the paper tortiously obtained by the bank, the avails of which had come into possession of the receiver,—and in such belief proved its claim as a general creditor,—equity ought to permit the withdrawal of such claim and the pursuit of an appropriate remedy, adequate under the circumstances to restore its property, unless the action of the appellant has wrought a change in the position of affairs, working legal detriment, that would render it inequitable for the appellant to pursue now a different course. We understand this to be the rule established,

whether the mistake may be deemed a mistake of law or a mistake of fact. Pom. Eq. Jur., Sec. 512; *Wells* v. *Robinson,* 13 Calif., 134; *Ward* v. *Ward,* 134 Ill., 417; *Becker* v. *Walworth,* 45 Ohio St., 173; *Johnson-Brinkman Commission Co.* v. *Central Bank of Kansas City,* 116 Mo., 558; *Nysewander* v. *Lowman,* 124 Ind., 584; *In re* Woodburn's Estate, Appeal of McMannis, 138 Pa. St., 606; *Macknet* v. *Macknet,* 29 N. J. Eq., 54; *Dunham* v. *Ewen* (N. J. Ch.), 15 Atl., 245."

(Pp. 399-400):

"The receiver is a trustee holding these funds for distribution among the creditors of the bank according to their respective rights. He is an officer of the law. Equity will not permit a trustee to avail himself, as against a *cestui que trust,* of a mistake of law on the part of the latter, when it is possible to correct the error without injury to the trust estate. Here, it is true, the specific money of the appellant is no longer in the hands of the receiver. It has been distributed by him, in the proper discharge of his duty, among the creditors; but as the property of the appellant was erroneously, although through no fault of the receiver, appropriated to the benefit of the general creditors, there is no injustice in a restoration, if assets remain out of which indemnification can be had. The general creditor will receive not a penny less than is his due. The appellant, if the remaining assets prove sufficient and availing, will receive that to which it is entitled and no more. There has been an erroneous diversion of the fund,—caused, it is true, by the act of the appellant. If legal injury has resulted from the act the appellant cannot be afforded relief, but it has not so resulted, and the general creditor will, by the granting of relief to appellant, be put in no worse plight than before the act. Restoration

for diversion of funds, whether from design or through mere error, is not to be denied unless the diversion has occurred through the wrong or error of the party seeking restoration, and when, in the case of error, there has been wrought legal detriment to the opposing right. This is certainly true with respect to trustees and officers of the law who are not permitted to assert a mere mistake of law as an excuse for the denial of justice and who are required to act as any high-minded man would act under the like circumstances. In *Ex parte* James, *In re* Condon, 9 Ch. App., 609, a creditor had obtained judgment and issued execution, which was levied by the sheriff upon certain personal property of the defendant, and upon its sale the proceeds were paid to the judgment creditor. Thereafter, the debtor being adjudicated a bankrupt, the assignee demanded the proceeds of the sale. The judgment creditor, supposing the assignee entitled thereto, paid over the same to him. Being afterwards advised that he had a right to retain the money, the creditor filed a petition against the trustee for restoration, and restoration was decreed. The court observed: 'That a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he had money in his hands which, in equity, belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people.'"

This case cites many additional cases, and concludes (p. 402):

"Here the receiver is an officer of the law, having the assets in *custodia legis*. He has no

interest in the fund, save to see that it shall be distributed among those entitled to it according to the highest principles of honesty and equity."

* * *

"The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due. To compass such a result is the highest equity, since otherwise the appellant will be deprived of its own, and the general creditors will receive that to which they have no right. The decree sustaining the demurrer and dismissing the bill for want of equity will be reversed, and the cause remanded for further proceedings according to law."

In the case at bar the court found (Rec., 268):

"That some of the property sued for in this action, including railroad rolling stock, was not, in fact, used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable."

It also found that appellant did not at any time, in intention or in fact, waive its title to the property sued for, nor did it, in intention or in fact, make any election of remedies or rights. (Rec., 268; Findings, 11, 12, 13.)

It also appears that the Kona Sugar Company, Limited, did not own the land across which the railroad was constructed, and in the construction of which a part of the material purchased from appellant was used. It leased a part of the right of way, and across one piece had no lease. It owned in fee only about two-thirds of a mile of the total of six miles constructed with the rails of the appellant.

(Rec., 88-93.) It, therefore, appears that little, if any, of the property was lienable. The rolling stock and most of the mileage was not lienable.

It will not be contended, we assume, that the rolling stock and some of the other materials of the contract, *e. g.*, the Howe scales, *were furnished to be used* in the construction of a railroad. *Neilson* v. *Iowa Central Railway Co.*, 51 Ia., 184; *New England Car Spring Co.* v. *Baltimore, etc., Ry. Co.*, 11 Md., 81; s. c., 69 Am. Dec., 181; 20 Ency. of Law, (2d ed.), 290; 23 *id.* 721.

We therefore contend that plaintiff's lien suit was in fact unavailable, for the law is that where a contract is for a lumping sum and contains lienable and non-lienable items, no lien can attach. Phillips on Mechanics' Liens, Sec. 296; *Adler* v. *World's Pastime Ex. Co.*, 126 Ill., 373; *Morrison* v. *Minot*, 5 Allen, 403; *Graves* v. *Bemis*, 8 Allen, 573; *Mulrey* v. *Barron*, 11 Allen, 152; *Driscoll* v. *Hill*, 11 Allen, 154; *Allen* v. *Elwart*, 29 Ore., 428, 444; *Getty* v. *Ames*, 30 Ore., 573; *Whitney* v. *Joslin*, 108 Mass., 103, 104; *Lambord* v. *Pike*, 33 Me., 141, 144; *First Natl. Bank* v. *Redman*, 57 Me., 405.

These cases are all directly in point and all lay down the rule before cited, which we believe to be undisputed law. The contract, being entire, cannot be apportioned and enforced in fragments, and as no lien is given for a *part* of the materials furnished and the price is a lumping sum, it is obviously impossible to enforce a lien as to any part of it.

The Hawaiian statute as to liens is very much like those in the cases cited (Civil Laws, Sec. 1741).

It provides for a lien for labor or material to be used

> "in the construction or repair * * * of any railroad * * *," and the lien is to exist "for the price agreed to be paid for such labor or material."

In the case at bar the rails were undoubtedly used in the construction of the road, but as it is impossible to designate "the price agreed to be paid" for such rails, it is clearly impossible, under the cases cited, to enforce a lien on the said rails.

It is equally clear that in this case certain of the articles furnished were not used "in the construction of the railroad," such as the splice bars, some of the spikes, sixteen cane cars, two locomotives, a rail bender, four track gaugers, two jacks, one track scale, and some other small articles. (Rec., 74.) Some of these articles, such as the rolling stock, *could not* have been used in the construction of the road. *Texas R. R. Co.* v. *Allen* (Texas), 4 Am. Dig. Col., 2115; *Gordon Hardware Co.* v. *S. P. R. R. Co.*, 22 Pac., 406, 407; *Neilson* v. *Ia. Ry. Co.*, 51 Ia., 184; *Central Trust Co.* v. *Texas, etc.*, 23 Fed., 703, 704.

Other material furnished was not, in fact, used, but was put aside and never made any use of. (Rec., 74.)

It is the settled law in Hawaii that

> "A material man is not entitled to a lien for material which, though furnished to a contractor for a building, never was incorporated into the building, but was delivered at the contractor's shop and by him disposed of for his own benefit." *Allen & Robinson* v. *Redward*, 10 Haw., 151.

The claim of the court, in its first opinion, that the contract of February 21, 1900, could have been referred to to ascertain the price at which the materials were sold, seems plainly untenable. The record shows that there were 188 tons of rails embraced in the first contract, not embraced in the second. It is clear the first contract was wholly abandoned and the contract of March 13, 1901, substituted therefor. There had been no delivery under the first, and there could be none, because the Kona Sugar Company could not make the payments required by the contract.

The price under the first contract for the goods actually delivered amounted to $36,252.80, while the price under the contract of March 13, 1901, was $47,044.53. The difference, $10,791.73, cannot be accounted for upon any other hypothesis than an entirely new agreement as to price, based upon, as we must assume, the fact of deferred payments and the wear and tear to which the merchandise would be subjected, and consequent depreciation prior to payment. It would be utterly impossible to apportion this increased price among the lienable articles.

The court will observe that the notice of material man's lien, and the proceedings to enforce the same, were based upon the contract of February 21, 1900 (Rec., 246, 250, 251, 258), which had been entirely superseded by the contract of March 13, 1901. In fact, the latter contract expressly declares that it is

> "in settlement of the contract between the Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated February 21, 1900, and accepted by the Kona Sugar Company, Limited, February 22, 1900."

It is idle to claim that a notice and claim for mechanics' lien upon a contract that no longer had any existence was effective to defeat remedies under a subsequent contract in nowise referred to in the proceedings. At least, it is clear that the person handling this matter for appellant had such a misconception of the facts and legal rights of the parties as to come within the principles of the cases above cited. To constitute an election there should be a knowledge of facts and a clear choice between rights, elements absent from the present case, for the action claimed to have constituted an election was based upon a contract which had no existence, the price or description of the materials could not be ascertained, and the use to which most of them had been put, and the ownership of the land over which the road was constructed precluded a lien. It is not believable that any sane person would have made such an election with knowledge of these facts, and the action can only be accounted for upon the theory that the Bierce attorneys, representing the other creditors and co-operating with the creditors' committee and the court, in a plan which required that the railroad remain, made no election for the Bierce Company. The case is clearly within the principle announced in *Wells* v. *Robinson,* 13 Cal., 134, where a party brought suit to recover judgment against an administrator for money embezzled by the intestate, pending which he filed a bill in equity to recover the property bought with the money. The suit at law was prosecuted to a judgment, and later a decree in the equity suit was taken out. The party in question apparently did not know the state

of the funds of the estate. The court, in discussing the subject, says:

> "Upon such a subject (election) no general rule can be laid down; but every case must be left to be decided on its own particular circumstances rather than upon any definite abstract doctrine. Before any presumption of an election can arise it is necessary to show that the party acting or acquiescing was cognizant of his rights. When this is ascertained affirmatively, it may be further necessary to consider whether a party intended an election. * * * We think the suit brought evidence of no such distinct and deliberate choice * * * as to bar the plaintiffs from prosecuting their equitable claim."
>
> "It would be unreasonable to suppose that they intended to surrender a claim on a specific fund * * * for a judgment against the administrator which would give them no better right to participate in this fund than the rest of the creditors."

Under these circumstances it is contended that, although there are no rights of innocent third parties to be here considered (Hutchins, the purchaser, having full written notice), the rule that a person cannot have the benefit of two inconsistent remedies or causes of action is applicable, and because these attorneys chose to file a notice of lien and commence a lien suit, their clients must lose title to their property without payment. The statement assumes too much. There must be two remedies. This means real remedies, not imaginary ones. The contention of the appellee and the law upon this subject are well stated in *Fuller-Warren Co.* v. *Harter* (S. C. Wis.), 53 L. R. A., 603, 606:

"Does that rule apply where a person, supposing he has two causes of action for the satisfaction of his claim, when in fact he has but one, sues upon the supposed cause which has no existence, and is defeated on that ground? Is he, under such circumstances, precluded from suing upon the only cause of action which he, in fact, had?" * * * "That seems to be unreasonable. If the doctrine as to the effect of an election between two inconsistent causes of action goes that far, it is certainly liable to cause great injustice in some cases. That, of itself, without investigation, suggests that it does not go that far. We should hesitate to sustain counsel's theory if the question involved was new, but it is not.

"The same seemingly unreasonable application of the rule, as regards the effect of an election between inconsistent remedies, as that contended for here, has been several times insisted upon in other courts, as appears from reported cases, and always unsuccessfully. In *Morris* v. *Rexford,* 18 N. Y., 552, the circumstances were that plaintiff sold a quantity of oats to the defendant, payment therefor to be made on delivery. The delivery was made but the purchase price was not paid. After some delay the plaintiff endeavored to rescind the sale contract and brought replevin. Subsequently he sued for the purchase price of the oats. On the trial it did not appear that recovery was had in the replevin action or what had become of the same. The court held that the mere commencement of the replevin action did not necessarily preclude plaintiff from prosecuting the action on the sale contract; that whether there was an election of remedies within the meaning of the rule on that subject depended upon whether the plaintiff had in fact two remedies; that if he had but one, the pursuit of one that he did not possess would not bar him from subsequently resorting to the one which he did possess. In *Kinney* v. *Kiernan,*

49 N. Y., 164, the court stated the rule in these words: 'The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights he really possesses.' In *McNutt* v. *Hilkins*, 80 Hun, 235; 29 N. Y. Supp., 1047, the decision was based on that in the preceding case cited. The rule declared substantially fits the exact facts of this case. The syllabus states it briefly, as follows: 'An action brought for the conversion of personal property, wherein it was successfully maintained by the defendant that the title to the personal property alleged to have been converted was in him, and in which judgment was rendered in his favor, is not a bar to a subsequent action between the same parties brought to recover damages for a breach of the contract of sale of such property.' In reaching such conclusion the court used the following language as to the contention of the losing party: 'The defendants, by their contention, succeeded in establishing that there had been an absolute sale, and that, therefore, the plaintiff had mistaken her remedy, and they cannot now set up the judgment which they then obtained to prevent the plaintiff recovering the purchase price of the property which they formerly urged and established was sold to them by her, and which it is conceded they have not paid for, and thus not only retain the property, but also the purchase price.' To the same effect are *Re Van Norman*, 41 Minn., 494; *Gould* v. *Blodgett*, 61 N. H., 115.

"In applying the rule as regards the effect of a choice between two inconsistent remedies or causes of action, it must be kept in mind that there must be two such remedies or causes of action, in fact, before a choice can be made within the meaning of the rule. A misconception of remedies should not be mistaken for an election between inconsistent remedies."

In *Snow* v. *Alley,* 156 Mass., 193, 194, 195, the court (HOLMES, J.) said:

> "But, apart from this answer, the defendant's argument rests on a misapprehension of the nature of election. Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. *Metcalf* v. *Williams,* 144 Mass., 452, 454. But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule. *Butler* v. *Hildreth,* 5 Met., 49, 52; *Snow* v. *Alley,* 144 Mass., 546, 554, 560; *Whiteside* v. *Brawley,* 152 Mass., 133, 135; *Morris* v. *Rexford,* 18 N. Y., 552, 557."

So, in *Butler* v. *Hildreth,* 5 Met., 49, 51, that court (SHAW, C. J.) said, immediately after the quotation made therefrom in the opinion of the court, overruling the petition for a rehearing in the case at bar:

> "But this determination will not extend to a case where facts subsequently come to the knowledge of the assignee, which, if he had known them before, would have led him to a different election—whether these facts relate to the character of the sale, and bear upon the question whether it was fraudulent or not, or whether they relate to the remedy. As if the assignee, on commencing his action for the price, believes that he has secured the amount due, by a valid attachment of the defendant's property, and afterwards discovers that it is not the property of the defendant, and that his supposed remedy has failed. Or, if he should discover that the defendant had an offset, which would be good against an action of trover."

It is true that many cases can be found where broad statements are made inconsistent with this view, *e. g., Hickman* v. *Richburg,* 122 Ala., 638, and the cases there cited. In that case, and all others well considered, the rights of innocent third parties were involved. There is no reason for such a rule as between the parties to the original transaction, or those claiming under them with notice. To apply such a rule as between the parties is to work great hardship, *e. g.,* suppose A sells a piano to B, reserving title in himself until payment is made. Hearing that B is about to leave the state, he brings attachment proceedings and seizes the piano. Learning that B, in fact, had not intended to leave the state, and would claim all the property in his possession, including the piano, as exempt under the law, he dismisses his attachment and brings replevin for the piano. Is there any reason why he should be bound by his so-called "election," and thereby B acquire title to the piano without cost?

It was contended in the court below that the contract of March 13, 1901, was not a conditional sale contract, but at most constituted only a mortgage. In view of this contention, it seems proper to discuss this question at this place. If the agreement was a mortgage, there was no title reserved in the plaintiff below on which he could maintain replevin against anyone, while if the sale was conditional and title was retained until the performance of the condition, the condition not having been performed, it follows as a matter of law that the defendant obtained no title to the property at the receiver's sale, and this action was properly brought.

The intent of the parties being a prime element to be considered in the interpretation of contracts, it will not be inappropriate to state at this time that there is nothing in the agreement of March 13, 1901, under which the property in controversy was delivered to the Kona Sugar Company, Limited, to warrant the assumption or inference that either party to said agreement intended that the property in controversy should become an integral part of the plantation, or that it should come under the mortgage, prior to the performance of the condition precedent stipulated in the agreement to the passing of the title to the Kona Sugar Company, Limited, namely, the payment of the note "according to its terms." The agreement in terms expressly negatives the idea that any such intention was entertained by either party. Even if this were not true, the question of intent is, in fact, foreclosed by the express findings of the trial court, as follows, to wit:

> Finding 5. "That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of $37,044.53, given in settlement of the contract of February 21, 1900."
>
> 8th. "That both the plaintiff, and the Kona Sugar Company, Limited, intended said contract of March 13, 1901, to operate as a conditional sale of the property sued for, and not as a chattel mortgage, or an absolute sale, with a lien reserved to the vendor."
>
> 9th. "That in view of all the circumstances of the case, said contract of March 13, 1901, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor."

We take it to be established by these findings, based upon the evidence before the court, that it was the intention of the plaintiff, and also of the Kona Sugar Company, Limited, that the title to the property should be retained in the plaintiff until the note was paid, and that the payment of the note was a condition precedent to the passing of the title to the Kona Sugar Company, Limited.

This brings us to the question whether the parties so expressed their intention in the agreement as to justify the trial court in announcing, as a conclusion of law, that the agreement was a conditional sale, and not a chattel mortgage.

The third conclusion of law announced by the trial court is as follows:

> "That the contract of March 13, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved by the plaintiff, and under which plaintiff has title to the property sued for."

The courts of a few of the states have expressed their disapproval of contracts of conditional sale on principle, and have exhibited a disposition to adopt slight pretexts for construing them to be absolute sales, and void as to innocent parties and creditors without notice unless acknowledged and recorded, as required of chattel mortgages. As instances of such courts, we may cite those of Pennsylvania, Illinois, Colorado and Montana. A few other states have by statute accomplished the same object, notably Iowa, Maine, Vermont, Kentucky and Texas. However, this court and the great majority of the courts of

the American states and territories, as well as the courts of England, have declared in favor of conditional sales of personal property, where the parties have expressed their intention to make them, and the transaction is free from fraud. One of the leading cases on this subject is that of *Harkness* v. *Russell,* 118 U. S., 663. The agreement under consideration in that case, as set out in the last paragraph of the syllabi, is as follows:

> "A, having agreed to sell certain personal property to B, on the performance of the conditions on his part, delivered it to him, and took from him a promissory note stating the following as the condition of the sale: 'The express condition of this transaction is such that the title, ownership or possession of said property does not pass from the said A until this note and interest shall have been paid in full, and the said A has full power to declare this note due and take possession of said engine and sawmill when he may deem himself insecure, even before the maturity of this note. In case said property shall be taken back, A may sell the same at public or private sale, without notice, or he may, without sale, endorse the true value of the property on this note, and I agree to pay on the note any balance due thereon after such endorsement, as damage and rental for said machinery.' B entered into possession, and, without performing the conditions of sale, sold the property to C, who knew that it had not been paid for, and that A claimed title to it. At the time of the sale to C, the value of the property was less than the amount due on the note. In an action against C to recover the value of the property, *Held,* that this transaction was not a mortgage, but was an executory conditional sale; and, being free from fraud, that it was valid."

The court said in its opinion (pp. 666, 667, 668):

"The first question to be considered is, whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: 'The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full.' If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of 'damages and rental for said machinery.' This stipulation was strictly in accordance with the rule of damages in such cases. Upon the agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with, or repugnant to, what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well

known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published forty years ago, two rules are laid down as established: (1) That where by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. (2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackburn on Sales, 152. And it is subsequently added, that 'the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and if they do so, their intention is fulfilled.' Blackburn on Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn, a third rule, which is supported by many authorities, to wit: (3) 'Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' Benjamin on Sales, 2d Ed., p. 236; 3d. Ed., Sec. 320. The author cites for this proposition, *Bishop* v. *Shillito*, 2 B. & Ald., 329, note (a); *Brandt* v. *Bowldy*, 2 Barn. & Adolph, 932; *Barrow* v. *Coles* (Lord Ellenborough), 3 Campbell, 92; *Swain* v. *Shepherd* (Baron Parke), 1 Mood. & Rob., 223; *Mires* v. *Solebay*, 2 Mod., 243."

The conclusions of the court, after an exhaustive review of the authorities, both of England and of the several states of this country, was:

> "That it is established by overwhelming authority that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction, and that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition, on which the agreement to sell was made, has been performed."

The same court said, in *Segrist* v. *Crabtree,* 131 U. S., 287, 292:

> "In *Harkness* v. *Russell,* 118 U. S., 663, 668, this court, after a full examination of the adjudged cases, recognized the general rule—at least as between the original parties to a conditional sale, and where the subject is not controlled by local statutes—to be as stated by Mr. Benjamin in his treatise on sales of personal property, namely: 'Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.'"

The case of *Harkness* v. *Russell, supra,* is cited as controlling authority, and followed in many cases, among which may be mentioned *Black Diamond Coal Mining Co.* v. *The H. C. Grady* (Strong, intervenor), 87 Fed., 232, 234; *McRae* v. *Merrifield,* 48 Ark., 160, 162; *Van Allen* v. *Francis et al.,* 123 Cal., 474, 478; *W. W. Kimball Co.* v. *Mellon,* 80 Wis., 133, 145; *Palmer* v. *Howard,* 72 Cal., 293, 295; *Rodgers* v. *Bachman,* 109 Cal., 552, 556; *Dodd* v. *Bowles,* 3

Wash. Ter., 383, 387; *Implement Co.* v. *Parlin & Co.*, 51 Kan., 544, 546; *Schneider* v. *Lee*, 33 Ore., 578, 582; *De Saint Germain* v. *Wind*, 3 Wash. Ter., 189, 193; *Manufacturing Co.* v. *Graham*, 8 Ore., 17; *Rosden* v. *Baker*, 8 Ore., 240; *Wadleigh* v. *Buckingham*, 80 Wis., 230, 236; *Kellogg* v. *Burr*, 126 Cal., 38; *Standard S. L.* v. *Dole*, 20 Utah, 469; *The John K. Shaw*, 32 Fed. R., 491, 496; *Warren* v. *Liddell*, 110 Ala., 245, 248; *Redewill* v. *Gillen*, 4 N. Mex., 78, 84; *New Haven Wire Co. Cases*, 57 Conn., 352, 386; 5 L. R. A., 307; *Hirsch* v. *Steele*, 10 Utah, 20; *McManus* v. *Wolters*, 61 Pac., 686.

The same doctrine is thus stated in 6 Am. & Eng. Enc. of Law (2d Ed.), 440, 441:

> "Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence, and the validity of such sales as between the parties thereto is unquestioned."
>
> "In most jurisdictions, in the absence of fraud, the rule is the same as to third persons, though in some states it is held otherwise, and in a number of states all conditional sales must be recorded in order to be valid as against third persons without notice."

This requirement of recording is entirely statutory and is not to be found in any of the statutes of the Territory of Hawaii.

In the same work (6 Am. & Eng. Enc. of Law, 2d Ed.), 481, it is said:

> "The vendor of property sold upon conditions precedent may recover it from a third person who has acquired possession from the vendee before the performance of the condition, al-

> though such person may have been ignorant of the vendor's claim."
>
> "In several states, however, the contract of sale is required to be recorded in order to enable the vendor to enforce his claim against third persons without notice."

It will be noted that in the Harkness case, as in the case at bar, a promissory note was given, and it was provided that the title to the property should not pass till the note was paid.

It is settled law that the giving of a note does not make the sale an absolute one. See, among other cases: *Crawdour* v. *Robertson*, 9 Ch. Div., 419; *Herring* v. *Hoppock*, 15 N. Y., 409; *Call* v. *Seymour*, 40 Ohio State, 670; *Pettyplace* v. *Manufacturing Co.*, 103 Mich., 155; *Hollenburg Music Co.* v. *Morris*, 35 S. W., 396; *Thomason* v. *Lewis*, 103 Ala., 426; *McPherson* v. *Acme Lumber Co.*, 70 Miss., 649; *Duke* v. *Shackelford*, 56 Miss., 552; *Van Allen* v. *Francis*, 23 Cal., 474; *Kirby* v. *Tompkins*, 48 Ark., 273; *Levan* v. *Wilten*, 135 Pa. St., 61.

Nor did taking the bonds as collateral to the note change the conditional sale into an absolute one. See: *Hollenburg Music Co.* v. *Morris*, 35 S. W., 396; *Cherry* v. *Arthur*, 5 Wash., 787 (32 Pac., 744); *Page* v. *Edmunds*, 64 Vt., 124; *Matthews* v. *Lucia*, 55 Vt., 308; *Clark* v. *Hayward*, 51 Vt., 14; *Chile* v. *Allen*, 33 Vt., 476; *Pettyplace* v. *Manufacturing Co.*, 103 Mich., 155; *Electric Co.* v. *Norris*, 59 N. W., 151; *Standard S. L.* v. *Dole*, 20 Utah, 469; *Sergeant* v. *Metcalf*, 5 Gray (Mass.), 306; *Dodd et al.* v. *Bowles*, 3 Wash. T., 383; *Lippincott* v. *Rich*, 56 Pac., 806.

The case of *Cherry* v. *Arthur*, *supra*, is exactly

in point on the proposition that taking additional security does not change a conditional sale to an absolute one.

Arthur delivered to Sherman a planer under a condition-sale contract, which the court says "was effectual to retain the title in appellant as between him and Sherman. *De Saint Germain* v. *Wind,* 3 Wash. T., 189 (13 Pac. Rep., 753); *Dodd* v. *Bowles,* 3 Wash. Ter., 383 (19 Pac. Rep., 156). Whether it were fastened to the building or not, so long as it did not become a part of the realty." Sherman mortgaged the planer with the sawmill and certain real estate to Cherry and Parkes, who filed a bill to foreclose the mortgage. The court held that the planer did not pass under the mortgage.

A part of the opinion is as follows:

> "But a point is made that the appellant had taken other security for the unconditional payment of the price of the planer, and that for that reason the sale should be held to become absolute. The price of the planer was $800, one-half of which was to be paid in cash, the conditional sale notes, under which the possession of the machine was claimed, covering the remainder. No cash was paid, but considerable time was conceded. When that time had expired, appellant took from Sherman a mortgage of real estate to secure the cash payment on the planer and certain other indebtedness then due. There was no pretense of any settlement between appellant and Sherman, and no agreement to surrender the conditional sale notes. Under these facts we see no reason for disturbing the contract between the parties.

In *Page* v. *Edwards,* 64 Vt., 124, the mortgage taken by the vendor was on other property than

the waterwheel and machinery in controversy and this mortgage was foreclosed, and yet it was held that neither the taking of the mortgage nor its foreclosure made the sale absolute. There was a mortgage on the mill prior to the conditional sale made, which prior mortgage, it was held, did not cover the waterwheel and machinery subsequently sold.

The court said (p. 132):

> "It is further claimed that the vendors waived their lien by taking their mortgage. If such a lien comes within the category of liens waivable in that way, it is manifest that this lien was not waived; for the report finds that the mortgage was taken as further security, which rebuts the presumption of a waiver, as it shows an intention not to waive; and whether waiver or not is matter of intention.
>
> "There is no ground for the claim that the foreclosure of that mortgage was a satisfaction of the lien, as the report finds that over $400 remained due after applying the value of the property obtained by the foreclosure aside from this machinery."

In the case of *Pettyplace* v. *Manufacturing Co., supra,* in a conditional sale upon the delivery of the property, four notes were given for the purchase price, in each of which it was stated that the express conditions of the transfer of the possession of the property were such that the title of the property did not pass from the vendor until the notes were paid in full. The fourth note was secured by a real estate mortgage executed by one of the purchasers. The mortgagor alone signed the fourth note and mortgage, and, in company with one of his covendees, took possession of the property (an engine and separator) and used the same for two years,

when he sold his one-third interest therein. The suit was by the purchaser of said interest sold against the vendor (who had seized the property) to recover the value of said interest.

It was claimed, among other things, that the giving of the mortgage made the sale absolute.

The court said (pp. 159, 160):

> "It is conceded that the title to personal property sold may be retained by the seller, and that a note may be taken for the price, and the sale will still be conditional; but it is claimed that, if other or collateral security be taken, then the sale becomes absolute. This is not the rule. It was held, in *Peninsular General Electric Light Co.* v. *Norris,* 100 Mich., 496, that a mechanic's lien could be enforced notwithstanding the title was held by the vendor. In *Manufacturing Co.* v. *Smith,* 40 Fed. Rep., 339, it was said:
>
> " 'Instead of being inconsistent, it was merely additional security to that provided by the statute. It certainly does not establish, as matter of law, that, in thus retaining title to the machinery, complainant has waived its statutory lien upon the lot of ground or premises on which the machinery was placed.'
>
> "In *Fuller* v. *Byrne,* 102 Mich., 461, a stipulation was inserted in the contract which provided that the property 'is and shall remain the property of Estey & Camp until each and every of said amounts, and interest thereon, and any judgment rendered thereon, is paid in full.' It was claimed that the rendition of judgment for the purchase price passed the title to the property. It was held that it did not have that effect, but that the vendor could take possession of the property under the contract.
>
> "It was held in *Couse* v. *Tregent,* 11 Mich., 65, that one in possession of personal property, of which he has made a conditional purchase,

> cannot, before the condition has been complied with, sell the property so as to vest the title in a *bona fide* purchaser. This rule has been restated in many subsequent cases, and in which it has been held that the contract need not be recorded as a chattel mortgage. The court below was clearly right in directing verdict for defendant."

There are a number of Massachusetts cases referred to in the Harkness case sustaining the position of the appellant in the case at bar. We will only quote from one of these. In *Coggill et al.* v. *Hartford & New Haven Railroad Co.*, 3 Gray, 545, 546, 547, Mr. Justice BIGELOW, speaking for the court, said:

> "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee, and against his creditors, claiming to hold them under attachments. *Hussey* v. *Thornton*, 4 Mass., 405; *Marston* v. *Baldwin*, 17 Mass., 606; *Burnett* v. *Pritchard*, 2 Pick., 512; *Whitewell* v. *Vincent*, 4 Pick., 449; *Hill* v. *Freeman*, 3 Cush., 257."

This Coggill case has been followed in numerous later Massachusetts cases. See: *Hirschorn* v. *Canney*, 98 Mass., 149, 150; *Nicholas* v. *Ashton*, 155 Mass., 205; *Wentworth* v. *Woods Machine Co.*, 163 *id.*, 28; *Catteral & Sons Co.* v. *Carter, Rice & Co.*, 173 *id.*, 155; *Oliver Ditson Co.* v. *William H. Bates*, 181 Mass., 455. All of the cases recognize replevin as the proper remedy to obtain possession of property from vendee.

It will also be noted that in the Harkness case, as in the case at bar, the purchaser had full notice of the rights of the vendor, and that the following extract from the opinion in the Harkness case is exactly in point, namely (p. 681):

> "But whatever the law may be with regard to a *bona fide* purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a *bona fide* purchaser without notice. The court below find that at the time prior to the sale he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners."

Again, if this question must be determined not by the general rule of law, but by the law of the jurisdiction where the property is located, and, in this instance, where the contract was made (*Green* v. *Van Buskirk*, 5 Wall., 307), then the agreement must be held to be a conditional sale.

The question of conditional sales has been presented to the Hawaiian courts in two cases. In the first, *Raymond & Wilshire* v. *Dole*, 4 Haw., 232, a conditional sale of personal property was upheld by the court, although an absolute and unconditional promise in writing had been given by the vendee to pay the purchase price, and the vendor was permitted to reclaim the property from the assignee in bankruptcy of the vendee. It is also of interest to note that in deciding this case the court based its decision on the definition of conditional sales given

in Benjamin on Sales and the decisions of the Supreme Courts of Massachusetts, New Hampshire and New York, some of the authorities relied on by the Supreme Court of the United States in the Harkness case. In the other case, *Fowler* v. *Heeia Sugar Co.*, 5 Haw., 410, the court found that the evidence failed to establish the fact that a conditional sale had been agreed upon between the vendor and the vendee, but used this significant language (p. 414-5):

> "As to the law, this court has, in *Raymond & Wilshire* v. *Dole, Assignee*, adopted the principle contended for by the petitioners, and, without saying that we should go as far as some of the cases cited by the petitioners, we should feel bound, if the evidence were direct and unequivocal, to support the alleged contract, but such evidence should be positive and certain in its details as to the terms and stipulations of such contracts."

The form of the agreement in the case at bar, being a letter addressed to the Kona Sugar Company, positively refutes the contention made by defendant that the parties intended it to be a chattel mortgage. The parties are presumed to know the statutes of Hawaii regarding the acknowledgment and recording of chattel mortgages.

> "In a late case it was held that a receiver appointed for the purpose of taking charge of the property and assets of a corporation is vested by law with the estate of the corporation, and derives his own title under and through it, and that for the purposes of litigation he takes only the rights of the corporation, such as could be asserted in its own name, and that, upon that basis only could he litigate for the benefit of other shareholders or creditors."

Gluck & Becker (2nd Ed.) Receivers of Corporations, section 58.

And at page 263 of the same section that author says:

> "The receiver acquires title by legal process and not in the regular course of dealing in commercial paper, and therefore he does not stand in the situation of an innocent *bona fide* holder for value." Citing *Briggs* v. *Merrill*, 58 Barbour, 389; *Van Wagner* v. *Paterson Gas Light Co.*, 3 Zabriski (N. J.), 283; *Bell* v. *Shibley*, 33 Barbour, 610.

Smith on Receiverships, Sec. 67, says:

> "The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is and that any defense which would have been good against the individual or corporation may be asserted against the receiver." Citing *Republic L. Ins. Co.* v. *Swiggert*, 135 Ill., 150; *Hyde* v. *Lynde*, 4 N. Y., 387; *Higgins* v. *Gilleshiener*, 26 N. J. Eq., 308.

And in the following section the same author says:

> "And generally the receiver takes the property of the debtor subject to all liens attaching thereto at the time of the appointment and all equitable defenses and set-offs." Citing *Adams* v. *Spokane Drug Co.*, 57 Fed., 889; *Bell* v. *Hanover National Bank*, 57 Fed., 822.

It appears furthermore that the bonds of the Kona Sugar Company were issued before the contract of conditional sale was entered into between plaintiff and the Kona Sugar Company.

The order of sale made by the court directed the receiver to sell the "right, title and interest" in the

property of the Kona Sugar Company, and in the execution of that order by the receiver only the property of the Kona Sugar Company was sold. As the title to the property in controversy never passed to the Kona Sugar Company, it was not included in the sale of "its property."

The common law rule in regard to the sale of personal property undoubtedly prevails in the Territory of Hawaii, namely:

> "That a title to personal property cannot be acquired from a person who himself has not title to it, except only by a *bona fide* sale in market overt." Chit. Con. (8th Amer. Ed.), 342.

There is no such a thing as "market overt" in the Territory of Hawaii.

> "Only such title and interest passes on a sale by the receiver as was possessed by the party whose interest is being sold. The rule *caveat emptor* applies, and it is for the purchaser to ascertain what that interest is. This rule applies, it has been held, to the condition of the property, as well as to its title, and in an action for the purchase money it is no defense, in the absence of fraud or misrepresentation, that the property was in a defective condition." 23 Am. & Eng. Ency. of Law (2nd. Ed.), p. 1082.
>
> "As in other judicial sales, he who purchases at a sale made by a receiver is presumed to know that the receiver can sell only such interest in the property as is possessed by the parties to the action in which he is appointed; in other words, the doctrine of *caveat emptor* applies. He must ascertain for himself what that interest is, and also what the condition of the property is, because the rule applies not only to the title but to the condition of the

property." Beach on Receivers, p. 785, Sec. 737, also Sec. 734, Ed. 1891.

The same author also says (Ed. 1891):

"The receiver can sell only the interest which he has in the property."

"As to the title and condition of the property, the rule of *caveat emptor* applies, and the purchaser takes the property subject to all liens or outstanding interests therein." Smith on Receivers, Sec. 34, p. 100. See also High on Receivers (3rd Ed.), Sec. 199b.

In *Barron, Receiver,* v. *Mullin,* 21 Minn., 374, the court said, on pages 376-377:

"The rule *caveat emptor* applies to purchasers at judicial sales. (*Bashore* v. *Whistler,* 3 Watts, 490; *Fox* v. *Mensch,* 3 Watts & Serg., 444; *King* v. *Gunnison,* 4 Penn. St., 171; *England* v. *Clark,* 4 Scam., 486.) The purchaser at such sales knows that nothing can be sold except the interest of the parties to the suit, and it is for him to ascertain before purchasing what that interest is. This rule applies not only in respect to the title, but to the condition of the property."

In the case of *Campbell* v. *Parker,* 59 N. J. Eq., 342, where a sale was made by a receiver without an order of court, it was claimed that it was not a judicial sale in the sense where the doctrine of *caveat emptor* applied.

The court, however, said in its opinion, on page 346:

"I am unable to adopt that view. It seems to me that if a sale by a sheriff by virtue of a writ directed to him by this court is a judicial sale, *a fortiori* one made by a receiver who is appointed by this court and who is in a sense an arm of the court, and, so to speak, a part of

it, is also a judicial sale. A sheriff is a ministerial officer, elected by the people, and is not identified with the court in the same sense that a receiver is."

This intention is clearly shown by the terms of the contract, the vendor retaining title to the property and the vendee consenting thereto. (*Hunt* v. *Bay State Iron Co.*, 97 Mass., 279.) The fact that the Kona Sugar Company did not have the fee to its right of way, except for a very small portion, would preclude the inference that it entertained any such idea, for it cannot be presumed to wish to construct a railroad for its lessors.

In *Gill* v. *De Armant*, 90 Mich., 425, the court said at p. 430:

> "The defendant's third claim was that the property taken by them and put in their mill at Petoskey was so annexed to the realty that an action of replevin could not be maintained, as its removal from the mill would be an injury to the realty to which it was attached. The court below ruled that the property had not become so attached. We think the court was correct. It was property belonging to the plaintiff, taken by the defendants and by them put in use in their mill. It was property capable of beneficial use if set up in any other place. No agreement is shown upon the part of the owner that the defendants might so attach it; and the defendants, under the circumstances here stated, cannot be permitted to make such a claim. Personal property may become a part of real estate where affixed to it, if such was the understanding between the parties; or it might remain personal estate, if the understanding to that effect was clearly indicated or fairly deducible from the circumstances. *Manwaring* v. *Jenison*, 61 Mich., 117; *Rogers* v. *Brokaw*, 25

N. J. Eq., 496; *Blancke* v. *Rogers*, 26 *id.*, 563; *Voorhees* v. *McGinnis*, 46 N. Y., 278. Here the attempt is made to take the property of another and to attach it to the realty, without the consent of the owner, and then to assert that it is a part of the realty. The court below very properly held that this could not be done."

In *Duke* v. *Shackelford*, 56 Miss., 552, in a suit brought to replevin machinery, it was held that the property could not become a part of the realty, because sold on conditional sale for cash and a note, and it was not necessary to tender anything back.

The following cases are in point on the general principle of the right to maintain replevin against third persons claiming under the vendee: *Partridge* v. *Philbrick*, 60 N. H., 556; *Ferguson* v. *Lauterstein*, 160 Pa. St., 427; *Blanchard* v. *Child*, 7 Gray, 155.

The case of *Marquette Mfg. Co.* v. *Jeffrey*, 49 Mich., 283, is important as showing that replevin can be maintained on a conditional sale where machinery was fastened and permanently bolted down and the boiler walled up in a building owned by the vendees, standing on leased ground where a creditor of the vendee had seized it on execution.

To same effect as to trover, where the vendee had sold the mill property, but vendors did not know how the machinery was attached, see *Ingersoll* v. *Barnes*, 47 Mich., 104.

In *Wiggins* v. *Snow*, 89 Mich., 478, in replevin, there was no provision authorizing vendor to take possession. Such provision was held implied on default of condition.

The retention of the title by the vendor in the case at bar, as well as the fact that the title to the land was not in the vendee, would seem to show beyond question that the intention of the parties was to have the property in controversy retain the character of personal property.

In the class of cases among which the suit at bar falls, the intention is what governs as to whether the property is or is not a part of the realty. *Baker* v. *McClurg*, 196 Ill., 28; *Hewitt* v. *Gen. Elec. Co.*, 164 Ill., 420; *Sword* v. *Low*, 122 Ill., 487.

The foregoing authorities, we submit, abundantly sustain the contention of the trial court that the agreement under consideration was a conditional sale and not a mortgage, and that no title to the property in controversy ever passed to or vested in the Kona Sugar Company, limited, and that the appellant may maintain replevin to recover the same. It is equally clear, we believe, that the appellant has not made an election of an inconsistent remedy so as to deprive it of that right.

Respectfully submitted.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY.